

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TRISTAR PRODUCTS, INC.,) 17-CV-1206

Plaintiff,)

vs.)

TELEBRANDS CORP., et al.,)

Defendants.)

-----)
TRISTAR PRODUCTS, INC.,) 17-CV-1204

Plaintiff,)

vs.)

E. MISHAN & SONS, INC.,)

Defendant.)

-----)
TRISTAR PRODUCTS, INC.,) 17-CV-5602

Plaintiff,)

vs.)

NOVEL BRANDS, INC.,)

Defendant.)

Camden, NJ
September 12, 2017
2:35 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOEL SCHNEIDER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff : EDWARD PAUL BAKOS, ESQUIRE
NOAM JOSEPH KRITZER, ESQUIRE
BAKOS & KRITZER
147 Columbia Turnpike
Florham Park, NJ 07932

For the Defendant
Telebrands: KATELYN O'REILLY, ESQUIRE
WALSH PIZZI O'REILLY FALANGA, LLP
One Riverfront Plaza
1037 Raymond Boulevard, 6th Floor
Newark, NJ 07102

(Appearances continued)

TONIA A. SAYOUR, ESQUIRE
ROBERT J. MALDONADO, ESQUIRE
VISHAL PARIKH, ESQUIRE
COOPER & DUNHAM, LLP
30 Rockefeller Plaza
New York, NY 10112

For the Defendant
E. Mishan and Sons:

DENNIS FRANCIS GLEASON, ESQUIRE
JARDIM, MEISNER & SUSSNER, P.C.
30B Vreeland Road, Suite 201
Florham Park, NJ 07932

ANGELO NOTARO, ESQUIRE
JOHN ZACCARIA, ESQUIRE
NOTARO MICHALOS & ZACCARIA
100 Dutch Hill Road, Suite 240
Orangeburg, NJ 10962

For the Defendant
Novel Brands:

BRIAN O'REILLY, ESQUIRE
EPSTEIN DRANGEL, LLP
60 East 42nd Street, Suite 2520
New York, NY 10165

Audio Operator:

ECR

Transcribed by:

DIANA DOMAN TRANSCRIBING, LLC
P.O. Box 129
Gibbsboro, New Jersey 08026-0129
Office: (856) 435-7172
Fax: (856) 435-7124
Email: dianadoman@comcast.net

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I N D E XMOTION TO STAYArgument By:

Ms. Sayour	7, 49
Mr. Zaccaria	19, 51
Mr. O'Reilly	30
Mr. Kritzer	33

1 (The following was heard in open court at 2:35 p.m.)

2 THE COURT: Everyone please be seated. We're on the
3 record in three cases. Tristar v. E. Mishan, 17-1204; Tristar
4 V. Telebrands, 17-1206; and Tristar v. Novel Brands, 17-5602.
5 These three cases have been consolidated for discovery and
6 case management purposes.

7 So let's start with the entries of appearance in
8 17-1204, the E. Mishan case, starting with plaintiffs.

9 MR. NOTARTO: Angelo Notarto, Notaro Michalos &
10 Zaccaria.

11 MR. GLEASON: And Dennis Gleason on behalf of E.
12 Mishan.

13 MR. ZACCARIA: John Zaccaria from Notaro Michalos &
14 Zaccaria.

15 THE COURT: So this is the 1204 case, right?

16 UNIDENTIFIED SPEAKER: Yes, Judge.

17 THE COURT: All right. 1206, Telebrands.

18 MS. O'REILLY: Good afternoon, Your Honor. Katelyn
19 O'Reilly from Walsh Pizzi O'Reilly Falanga on behalf of
20 Telebrands. With me I have my co-counsel, Robert Maldonado,
21 and Toni Sayour, and Vishal Parikh from Cooper and Dunham.

22 THE COURT: Welcome.

23 COUNSEL: Good afternoon, Your Honor.

24 THE COURT: And 5602, Novel Brands.

25 MR. O'REILLY: Brian O'Reilly, Epstein Drangel for

1 Novel Brands, Your Honor.

2 THE COURT: Counsel, I've read all the papers. I
3 think I understand the arguments. We'll hear all of your
4 arguments this afternoon. The Court is going to reserve
5 decision. I wanted to hear argument today and check up on a
6 couple of things, but you will get the Court's ruling
7 promptly.

8 Before we start, question about the Novel Brands
9 case. Are you taking your position on this motion?

10 MR. O'REILLY: We are, Your Honor. We didn't put in
11 papers, just because we didn't want to contribute to the
12 Docket. But we stand with the other defendants now that it's
13 consolidated. We figured as one goes, they all go.

14 THE COURT: Okay. You might want to send me a
15 letter to that effect in the future.

16 MR. O'REILLY: We will, Your Honor. Yes, I know.

17 THE COURT: Because there's nothing on the record
18 that shows that you joined --

19 MR. O'REILLY: We'll put it in by the end of the
20 day, Your Honor -- actually by the end of tomorrow, if that's
21 okay.

22 THE COURT: Okay. Well we have a transcript now.

23 MR. O'REILLY: Okay.

24 THE COURT: All right. The first motion was filed
25 in the Telebrands case, so I think we ought to hear from them

1 first. And, Telebrands, it's your motion, so I'll hear from
2 you. But if you'll indulge me, I just have a question to
3 start.

4 It's unclear to me if you're requesting a stay of
5 the entire case, or if you're requesting a stay of just the
6 patent portion of the case.

7 MS. O'REILLY: Your Honor, we are requesting a stay
8 of the entire case. Both the patent claims and the trade
9 dress claims.

10 THE COURT: Is that the same for E. Mishan as well?

11 MR. ZACCARIA: Yes, it is, Your Honor.

12 THE COURT: And is that the same for Novel Brands as
13 well?

14 MR. O'REILLY: Yes, Your Honor.

15 MS. O'REILLY: Your Honor, we have a presentation,
16 if I may approach and hand it up?

17 THE COURT: Can you indulge me with another
18 question?

19 MS. O'REILLY: Sure.

20 THE COURT: Is the Court's understanding, correct,
21 that there are two other similar cases pending in New Jersey?

22 MS. O'REILLY: That is my understanding, Your Honor.
23 I believe there are two other cases pending in Newark.

24 THE COURT: Right.

25 MS. O'REILLY: Yes.

1 THE COURT: Is anybody doing anything about trying
2 to consolidate all those cases?

3 MS. O'REILLY: On behalf of Telebrands, I do not
4 know. No one has approached us with respect to that, so I'm
5 not sure. I don't know that there's anything on the Docket.

6 THE COURT: How about Tristar?

7 MR. BAKOS: Your Honor, Edward Bakos of Bakos &
8 Kritzer for Tristar Products. We have not made any effort.
9 Those cases are moving along up there. The defendants have
10 not requested a consolidation of those cases.

11 There are other cases pending within the U.S. as
12 well.

13 THE COURT: So, counsel, what do we say when Tristar
14 stands up and says, Judge, why should you stay these three
15 cases when there's two almost identical cases up in Newark
16 that are going to proceed?

17 MS. O'REILLY: Your Honor, they didn't argue that
18 here. So if they were going to argue that, I'd be surprised
19 to hear that today. But if they do say that, I'm not sure
20 that they have the exact same patents that we do, so I'm not
21 -- I'm not certain that it would be exactly the same.

22 MS. SAYOUR: Good afternoon, Your Honor. Tonia
23 Sayour with Cooper & Dunham for the defendants. And
24 defendants respectfully request that you grant the motion to
25 stay pending reexamination, particularly where the Patent

1 Office has decided that there are substantial questions of
2 patent validity in light of almost all the prior art that was
3 cited by Telebrands, from all foreign design patents in this
4 lawsuit.

5 THE COURT: I keep on thinking of questions I want
6 to ask you. One more.

7 MS. SAYOUR: Sure. Of course.

8 THE COURT: I just wanted to make sure my
9 understanding is correct.

10 MS. SAYOUR: Sure.

11 THE COURT: In your case, 1206, there are four
12 design patents that are asserted, is that right?

13 MS. SAYOUR: Correct.

14 THE COURT: And is it correct that ex parte
15 reexamination, that request was granted as to all four
16 patents?

17 MS. SAYOUR: Correct. And, actually, that leads me
18 into the next slide. It's Slide 2. Just to give the Court a
19 quick overview of the facts and the different patents that are
20 at issue in our case, as we said, there are four design
21 patents at issue.

22 Three of those patents are directed to a pan.
23 There's the 664 patent, which is the broadest patent. It's
24 the square pan, it disclaims the handles. There's the 103
25 patent, which is also the square pan like the 664, but it adds

1 an induction plate on the bottom of the pan. And then there
2 is the 641 patent, which is also the same square shape as the
3 664 patent, but includes the handles, the induction plate, and
4 also the color.

5 If we turn to slide 3, please. The last patent
6 that's asserted against the defendants is a patent directed to
7 a fry basket. That's the 352 patent. The next slide. This
8 slide has a relevant time line as it relates to the filing of
9 this action and the requests for reexamination filed by
10 Telebrands.

11 Tristar commenced this action on February 21st of
12 2017, and just ten days later Telebrands filed the first
13 reexamination request for the broad patent, the 664 patent,
14 the broader of all the patents.

15 THE COURT: Are you showing us this chronology to
16 support your contention that there was no dilatory motive on
17 your client's part?

18 MS. SAYOUR: You read my mind, Your Honor. That's
19 exactly why. There has been an allegation that we were very
20 dilatory, and I think this shows that we moved rather
21 promptly. So we filed the first request ten days after the
22 complaint was filed, and then the other two reexamination
23 requests were filed two months after that.

24 And then the last one on the fry basket was filed
25 one month after they amended the complaint to add it an issue

1 in this lawsuit. The Patent Office granted the first
2 reexamination request on May 24th, 2017. And then Telebrands
3 filed this action one month later. And after the filing of
4 the action, the Patent Office order the other three
5 reexaminations in August.

6 And that summarizes this slide. Can we turn to
7 slide 5, please? So as the reason why we're here on what we
8 have now is that the Patent Office has ordered reexamination
9 in all four patents in suit, and I'll admit that the animation
10 is -- is a little bit dramatic. But it is an important fact
11 here, Your Honor.

12 On the next slide for the 664 patent, the Patent
13 Office determines that there's a substantial new question of
14 patentability in view of all ten references that Telebrands
15 had cited. And on the next slide, we have all ten of those
16 references next to some figures of the 664 patent.

17 On slide 6, the 103 patent. The Patent Office
18 determined that there's a substantial new question of
19 patentability as to all 13 references that Telebrands cited.
20 And if we turn to the next slide, same as before, all 13 of
21 those references are shown there, next to some of the figures
22 of the 103 patent.

23 Next slide, please. Same thing with the 641 patent,
24 they found that there's a substantial new question of
25 patentability in view of all 13 references cited by Telebrands

1 in the 641 patent. And the next slide also has those figures
2 there as well.

3 And the next slide is the fry basket. The Patent
4 Office didn't agree with all of Telebrands's art there. They
5 found that it was -- there's a substantial new question of
6 patentability for two of the five references we cited. But
7 they are depicted on the next slide. And sometimes a picture
8 is worth a thousand words, and the fry basket seems somewhat
9 identical to the patent suit there.

10 So that brings us to the legal issues in this motion
11 and -- and as the Court is aware, there are three factors that
12 are considered in deciding whether to grant a motion to stay
13 pending reexam. Your Honor referred to them as the Xerox
14 factors in the Brass case. And they are whether a stay would
15 unduly prejudice or present a clear tactical disadvantage to
16 the non-moving party.

17 Whether the stay would simplify the issues, and the
18 stage of the litigation. And all those factors weigh in favor
19 of granting a stay. So if we look -- we're going to work a
20 little backwards. If we look at the third factor, the stage
21 of the litigation, this factor's easy, because the plaintiffs
22 concede that litigation is in its early stages.

23 The second amended complaint was filed less than
24 four months ago. There's been no discovery, no scheduling
25 order. And I believe that this factor's very important here

1 because a vast majority of the cases that were cited by the
2 plaintiffs in their briefing, those cases were much further
3 along where they denied the motion to stay, those cases are
4 much further along.

5 This factor has actually been characterized as "one
6 of the most critical factors in determining whether to stay
7 litigation pending the outcome of a reexamination proceeding."
8 That's the Sybert v. Waddington case, 2007 Westlaw 20 --
9 excuse me -- 2705157 at 7. It's a District of New Jersey case
10 September 7, 2007.

11 So this factor we believe leans heavily in favor of
12 granting the stay. If we turn to the next slide. With
13 respect to the second factor, the simplification of the
14 issues. There are many advantages that -- of a reexamination
15 that are considered by Court's. That this Court is also
16 aware, they are laid out in the Eberle case.

17 Rather than read them all, they're all there, and
18 we'll go into a few shortly. But this case could benefit from
19 these advantages. If you'd turn to the next slide, please?
20 If the Patent Office finds that any or all of these patents
21 are invalid, and we think it is likely that they're going to
22 do so, the issues for trial would be greatly narrowed, if not
23 eliminated all together, and that would necessarily alleviate
24 discovery problems.

25 And it could eliminate the need to make infringement

1 determinations. And for discovery, elimination of the patent
2 issues would take one of the parties out of the case, that's
3 the Chinese entity Ke M.o. House, and it would help in terms
4 of discovery of one of the Chinese inventors as well.

5 We don't think the plaintiffs can seriously contest
6 that there would not be a reduction of costs if the case were
7 stayed for the parties and the Court, along with the
8 conservation of judicial resources. Depending on the outcome
9 of the case, there could be an encouragement to settle. So we
10 think that the second Xerox factor supports granting a stay as
11 well.

12 And the first factor, which will be the last factor
13 that we'll discuss, which is the prejudice to the plaintiffs,
14 we turn to slide 18, please. The cases have recognized,
15 because the possibility of delay is present in every case
16 where a stay is sought to allow the Patent Office to reexamine
17 a patent, then delay alone is an insufficient basis to deny
18 the stay.

19 And the Court would actually look to something else
20 to show prejudice, and in this case while we don't deny that
21 we're competitors, the inquiry doesn't end there. We're not
22 talking about a drug product, where you often have two players
23 in the market, the generic and the brand name.

24 We're talking about cookware. And in particular
25 we're talking about square pans. And this market is not a two

1 player market, and plaintiffs don't make that claim. There
2 are many other sellers of cookware and square pans. Some are
3 named defendants in other lawsuits. And some supply the prior
4 art.

5 So there is case law that says there is less of a
6 risk of undue prejudice when there are a number of active
7 companies in the relevant market. That's the Neste Oil v.
8 Dynamic Fuels case. It's a 2013 Westlaw 424754 at 3 it's a
9 District of Delaware case.

10 Now in the event that the Court were to determine
11 otherwise, which we would dispute, the Court should still
12 grant the motion to stay, because in the Thermolife case, and
13 I apologize I don't the citation on me right now, but it's in
14 our briefing. Oh, no, it's actually in Tristar's briefing, it
15 was cited by Tristar.

16 There are other -- the other factors, the
17 simplification of the issues, and the stage of the litigation
18 weighed in favor of granting the stay there. Now this case
19 involves a little bit of a unique situation in that the
20 plaintiffs moved for preliminary injunction against us. But
21 they voluntarily withdrew it after the Court denied the
22 preliminary injunction in the Emson litigation.

23 This isn't a situation where they didn't file a
24 motion -- they did file it, it's somewhat worse, and
25 voluntarily withdrew it after the Court issued a decision

1 saying that their irreparable harm claims, among other things,
2 were unsupported by any evidence. And it's the same thing for
3 this motion, they're relying on the same thing.

4 And it's particularly problematic here, where this
5 Court has required tangible evidence of how Telebrands's
6 actions have affected it in the market. And that's the Smart
7 Vent case. So -- and in the unlikely event these patents do
8 survive reexamination, we would submit, Your Honor, that a key
9 issue in this case, which distinguishes from some of the cases
10 cited by plaintiffs, is that monetary relief would compensate
11 them for their purported losses.

12 The Court in Emson, in denying the preliminary
13 injunction, also found that to the extent any statements
14 support a finding of price erosion or lost sales, the money
15 damages could be available to compensate them for any harm.
16 And that is certainly the case today. So in short, there's no
17 undue prejudice to plaintiffs in granting the motion for a
18 stay.

19 THE COURT: Tell me why the whole case should be
20 stayed, instead of just staying the patent portion of the
21 case?

22 MS. SAYOUR: So we recognize, Your Honor, that there
23 are trade dress claims as well. And we think that the Court
24 could benefit from the Patent Office's findings in that
25 regard. If the Patent Office rejects the design of

1 plaintiff's square pan and finds that it's obvious in my prior
2 art, for example, then we think that plaintiffs will have a
3 hard time proving that their -- their trade dress is
4 distinctive, and that they have exclusive use to that design,
5 because there would be others in the market.

6 We also -- we also think that they've admitted in
7 their briefing that discovery will overlap with discovery for
8 the patent claims. So if that's the case, then they are
9 intertwined, at least according to -- to plaintiffs. It's on
10 page four of their brief, Docket Number 47.

11 And I also want to --

12 THE COURT: But I remember reading, I'm not sure
13 which defendant's brief it was, that said the exact opposite.
14 Was that your brief?

15 MS. SAYOUR: I think it may have been our reply
16 brief.

17 THE COURT: Okay. On page 12?

18 MS. SAYOUR: Yes, I believe it was. And I -- I do
19 note that there are differences between the two claims. But
20 if they're admitting that those claims are the same, at least
21 for these purposes, then I think that that cuts -- that cuts
22 against them --

23 THE COURT: So they're admitting there's an overlap,
24 you wrote that --

25 MS. SAYOUR: Discovery.

1 THE COURT: -- discovery is different. But I should
2 believe them instead of you?

3 MS. SAYOUR: Well I think there is a slight -- well,
4 no.

5 THE COURT: Do you want to take back what you wrote
6 in the brief?

7 MS. SAYOUR: I think we were probably a little
8 over-zealous, if you ask me, when rereading that. But --

9 THE COURT: But you've got to be careful, sometimes
10 judges read the briefs.

11 MS. SAYOUR: I do want to make a -- make a note of
12 one thing, and it may border also on the -- on the undue
13 prejudice as well. Plaintiffs claim, I think in the
14 preliminary injunction briefing, that they were selling this
15 product, I believe it was 2016, and that Telebrands came to
16 the market in about March of 2016. And certainly if they
17 believed they were being harmed by the trade dress, they could
18 have -- could have brought a preliminary injunction, could
19 have sued over a year ago.

20 And they didn't do that. Instead, they waited for
21 those design patents to come in. And that, to us, is an
22 admission that they're tied together, at least in their eyes.

23 THE COURT: Well can we bring it down to a real
24 practical level? In terms of, say, discovery, can you talk
25 about whether in fact there will be an overlap in the

1 discovery needed to prove the trade dress claim and the patent
2 claim?

3 I understand the elements are different. But, for
4 example, are the same people going to be deposed? Are the
5 same documents going to be requested? Is the same ESI going
6 to be searched for and produced?

7 On a real practical level, can you tell me about
8 that?

9 MS. SAYOUR: Sure. Yes. Absolutely, Your Honor.
10 And I do think there is an overlap, and I would say that it's
11 in the context of functionality. I think there are elements
12 of these design patents that we would view to be functional
13 and not part of the design. When we talk about trade dress,
14 functionality is a key issue there, because in order to have a
15 protectable trade dress, they have to prove it is
16 non-functional.

17 So I do foresee a lot of overlap in -- in getting
18 down to the bottom of what it is that's functional versus
19 nonfunctional.

20 THE COURT: Okay. Anything else?

21 MS. SAYOUR: I think that's all for now.

22 THE COURT: Okay. It's your motion, you'll have the
23 last word.

24 MS. SAYOUR: Thank you, Your Honor.

25 THE COURT: I do think it makes sense to hear from

1 the other moving parties before we hear from plaintiff. So
2 why don't we hear from them. And that's the 1204 case.

3 So let me just make sure I have this right, counsel.
4 In your case, six patents are asserted, is that right?

5 MR. ZACCARIA: That's right, Your Honor.

6 THE COURT: And in your case, three of the six
7 patents are subject -- presently subject to reexamination?

8 MR. ZACCARIA: That's correct, Your Honor.

9 THE COURT: Three of six?

10 MR. ZACCARIA: Yes. Those patents are the 103
11 patent, the 664 patent, and the 352 patent.

12 THE COURT: And what's your response if plaintiff
13 stands up and says, Judge, it doesn't make sense to stay these
14 cases, because the same exact discovery is going to go on in
15 two cases up in Newark?

16 MR. ZACCARIA: Your Honor, those are different
17 products, different defendants, not related at all to the
18 defense and the products that are at issue in this case. The
19 issues are different, the discovery is probably going to be
20 different in terms of the origination of the defendant's
21 products.

22 So I think the --

23 THE COURT: Are they different patents, do you know?

24 MR. ZACCARIA: I don't know off the top of my head.
25 I believe there's at least one overlap of the patents, Your

1 Honor. And as counsel pointed out, that was not a point that
2 was raised by Tristar in its opposition papers.

3 Your Honor, I want to touch on, just real quickly,
4 since it's fresh, the issue about the trade dress claims and
5 other discovery that could be implicated -- overlapping
6 discovery. First, with respect to trade dress claims, the
7 trade dress claims, Your Honor, are really red herrings in
8 this case.

9 The crux of this case concerns design patents for
10 pans. That's the crux of this case. The trade dress claims
11 are really an afterthought. And, Judge --

12 THE COURT: Can I say that in my opinion? That's
13 your view, right?

14 MR. ZACCARIA: That's right, Your Honor.

15 THE COURT: What do you think plaintiffs are going
16 to say in response to that argument? Do you think it's --
17 isn't it likely they're going to disagree with that?

18 MR. ZACCARIA: I think, Your Honor, if I could
19 continue, Judge Bumb in her opinion noted, in her opinion
20 denying the motion for preliminary injunction, that there was
21 no evidence of actual confusion. There was no evidence of
22 secondary meaning that was established at the time that Emson
23 first introduced the product.

24 So I think there -- it's going to be a tough case to
25 show a likelihood of confusion. But, nonetheless, Your Honor,

1 in terms of the overlap discovery, the overlap discovery, the
2 same products are at issue, Emson's products are at issue with
3 the design patents, are also at issue with respect to the
4 trade dress claims.

5 Plaintiff is asserting trade dress for product trade
6 dress and packaging trade dress. So the overlapping discovery
7 includes sales information leading to those products, it could
8 include third-party discovery, where third-party products or
9 third-party patents relevant to a potential prior art position
10 could also be relevant as to whether or not that prior art
11 existed at the time that plaintiffs claim that they were
12 establishing their trade dress.

13 So that can include taking foreign discovery,
14 discovery of the manufacturers and suppliers of these
15 third-party pans that were noted in Emson's opposition to the
16 motion for preliminary injunction. So there's certainly a
17 vast overlap in discovery. And it's our position that it
18 would be inefficient to go ahead with the trade dress claims
19 while the patent claims are -- are stayed.

20 And the same witnesses that will be testifying as
21 regarding the origination of the Emson products, the
22 development of the Emson products, are going to be testify --
23 that testimony's going to be relevant to both the patent
24 claims and the trade dress claims.

25 So just as Your Honor knows, the patent

1 reexaminations are administrative proceedings that have been
2 implemented for a just, efficient resolution of patent and
3 validity issues. And the Patent Office has been basically
4 ordered by statute to conduct these reexaminations by special
5 dispatch. They proceed, not in the ordinary course of a
6 normal examination where you file a patent application and it
7 goes through its normal process of examination.

8 In contrast, a reexamination concerns -- it is a
9 process where the examiner -- and it's a different examiner,
10 Your Honor, which is important. It's not the same examiner
11 that studied the patent -- first -- the application the first
12 time around. It's a different examiner.

13 So that different examiner has to examine the -- the
14 claims and issue an office action. The applicant, or the
15 plaintiff in this case, must respond to that office action
16 within two months, which is different from the ordinary course
17 if this was a normal examination. So, in other words, what
18 I'm trying to say, Your Honor, this is a proceeding that's
19 going to proceed with special dispatch, which the Patent
20 Office is obligated to do.

21 I think the third point is really the point -- the
22 third point regarding the status of the litigations I think is
23 the -- I think it to be undisputed that certainly these cases
24 are in their very early stages. There's been some written
25 discovery that's been exchanged between the parties, but

1 there's been no noticed depositions. There's been no
2 depositions taken. There's been no expert discovery.

3 There's been nothing with respect to claim
4 construction. In fact, the plaintiff just recently filed an
5 amended complaint -- fourth amended complaint, Your Honor.
6 Four amended complaints they recently -- they issued, which
7 basically I think basically is going to reset the scheduling
8 in the Emson matter.

9 So, you know, there's been no dispositive motions
10 filed, obviously. So I think the -- and the fact that the
11 cases have been consolidated for discovery and case management
12 purposes, I think also weighs in favor of staying these cases.
13 Because, if not, then you could have the risk of inconsistent
14 rulings in these different cases, if one -- for example, if
15 one case is stayed against a particular defendant and not the
16 other defendant.

17 So that third factor weighs in favor of the stay.
18 The second factor, in terms of simplifying the issues, we
19 acknowledge there are going to be issues after their
20 examination, you have trade dress claims. Three of the
21 patents which are being asserted against Emson are not the
22 subject of reexamination. But those facts alone, Your Honor,
23 are not the basis for denying the grant of stay. These issues
24 are going to be simplified.

25 If a claim -- if one of the patents get knocked out,

1 or few patents get knocked out, that's going to certainly
2 resolve discovery issues. There'd be less discovery on those
3 claims, obviously. There will be no claim construction issues
4 relating to their patent if it gets knocked out. We won't
5 have to -- there will be no expert discovery relating to those
6 patents get knocked out.

7 And even assuming, Your Honor, that none of the
8 claims and none of the patents do get -- are certified
9 invalid, this Court has acknowledged the benefit of -- of
10 these reexamination proceedings. The examiners when they look
11 at these -- these reexaminations, they're going to study the
12 claims.

13 They're going to study the prior art. And the
14 examiner is not going to limit him or herself to only the
15 prior art that Telebrands proposed, they're going to do their
16 own search. So they may find other prior art that they may
17 feel is more important, more significant, and base an office
18 action on that additional prior art.

19 So -- and we don't know at this point. There's been
20 no office action issued to date in -- in either of those
21 reexaminations. So there could be additional prior art that
22 could be relevant in the Patent Office's mind. But the
23 examiner will do their own search. They'll issue an office
24 action, and there will be -- and then the -- Tristar will have
25 two months to respond to an office action.

1 Tristar could make statements during the prosecution
2 which could be very relevant to the claim construction. They
3 could take a position which may narrow the scope of the
4 claims, which would be very helpful to the Court in its claim
5 construction proceeding, once the cases are restarted. So
6 there's -- there's certain benefits, regardless of whether
7 their -- the claim -- patents are deemed invalid or not, that
8 certain benefits in staying the case in the event they're not
9 deemed invalid.

10 In addition, there are -- there were two patents
11 that Tristar recently asserted against Emson, the 908 patent
12 and the 909 patent. Those are the patents that are the
13 subject of the fourth amended complaint. Those two patents
14 are a continuation -- continuations of the Rometh Reed patent,
15 which is the subject of a reexamination.

16 In the Emson's reply on page four, Your Honor -- I'm
17 sorry, page seven, Your Honor, and on page eight. We -- we
18 showed side-by-side the figures of -- figure 7 of 108 -- of
19 103 with the 908 patent and the 909 patent. Each one of those
20 three patents potentially disclose the same subject matter.
21 The difference with the 909, Your Honor, is that it discloses
22 the induction plate, and it discloses a center around the --
23 in the center of the induction plate. But it shows the pan
24 body and the handles in dash line.

25 But it's -- everything else in terms of the

1 induction plate is the same as in the 103 patent. With
2 respect to the 908 patent, the 908 patent discloses the pan
3 body, and it discloses the induction plate. But it shows --
4 it discloses the center of that induction plate in dash line.

5 So what does that mean? Well I think we'll find out
6 once the reexamination -- the reexamination of the 103 patent
7 may lead to some evidence in terms of what exactly does that
8 mean. And I think that would help in claim construing the 908
9 patent.

10 What I'm trying to say, Your Honor, these -- these
11 disclosures are very -- essentially identical, and any prior
12 art that's going to be applicable for the 103 patent likely
13 also will be application to the -- the analysis of the 908
14 patent and to the 909 patent for validity purposes.

15 And, again, I think it's important to point out that
16 these -- these patents were asserted after we filed the motion
17 to stay. They weren't filed before. And I think they're
18 really filed really to create -- to try to fabricate some
19 issues in connection with this motion to stay.

20 I think with respect to the first factor, the undue
21 prejudice factor is probably the one that's most controversial
22 between the parties. And there, I think counsel, I think
23 appropriately described the reasons as to why there is no
24 undue prejudice. I think -- we acknowledge that the products
25 are competing products. We're not disputing that. But there

1 are third-party suppliers of the same square pan patents, and,
2 for example, we even included samples of that in the Exhibit C
3 to my declaration. Other square pans that are being supplied,
4 or sold on the marketplace.

5 THE COURT: Is there some advantage to a square pan
6 as opposed to a round pan?

7 MR. ZACCARIA: Your Honor, there could be an
8 advantage, if you want to create a square casserole. I
9 suppose you can't create a square casserole in a round pan.

10 THE COURT: You're talking to someone who doesn't
11 cook at all.

12 MR. ZACCARIA: Yeah.

13 THE COURT: I just wonder why these are so popular.

14 MR. ZACCARIA: Your Honor, there could be some
15 functional aspects to that, so --

16 THE COURT: That's beyond your -- that's not part of
17 your patent case.

18 MR. ZACCARIA: -- I'm not going to lie to you there.

19 THE COURT: Someone I know in here has the answer to
20 that. There must be some advantage, because so many people
21 are selling square pans now.

22 MR. ZACCARIA: Well those square pans, Your Honor,
23 were sold prior to the Tristar square pan. And those square
24 -- examples of those square pans were cited in Emson's
25 opposition to the motion for preliminary injunction. One

1 included the Wool, W-O-O-L, pan. There was a -- they
2 submitted a -- they catalog a Freiling catalog which disclosed
3 another square pan. So there were other square pans in the
4 marketplace prior the Tristar square pan.

5 THE COURT: But now when you go to Walgreens they
6 have a whole section of square pans. Different companies.

7 MR. ZACCARIA: And no one -- and there's been no
8 evidence of record that anyone's been confused with those
9 square pans being sold, Your Honor. Which goes to the trade
10 dress issue.

11 But going back to the undue prejudice factor. So --
12 so we have third -- other third parties selling square pans,
13 as shown on the record. You know, in terms of these
14 conclusory allegations about price erosion, and loss of market
15 share, and having to decrease prices, there's no evidence that
16 there's been an altered market share whatsoever.

17 And Judge Bumb noted that in her decision, in her
18 opinion. And there's been no evidence submitted in response
19 to the motion to stay of any loss of market share, or any
20 price erosion. And Court's -- this Court has held those types
21 of damages can be -- can be compensated by -- by monetary
22 damages, by monetary compensation.

23 And that should not be the reason to deny a motion
24 to stay. I'm just flipping around, Your Honor, because I
25 don't want to repeat the arguments that were previously made,

1 Your Honor.

2 (Pause)

3 MR. ZACCARIA: Your Honor, I don't think any -- it
4 may not have been -- may have been noted, but the normal
5 pendency of an examination is typically around 20 months, or
6 24 months.

7 THE COURT: Does that include the appeal to the
8 Federal Circuit?

9 MR. ZACCARIA: The appeal to the Federal Circuit is
10 different, Your Honor. The appeal to the Federal Circuit can
11 typically take anywhere between two to three years. It's
12 important to note, Your Honor, that in a reexamination, Your
13 Honor I'm sure knows this, it's only the patent owner that can
14 appeal.

15 Once the requestor submits their request for
16 reexamination, they're basically out of the picture. So now
17 it's really the only -- it's the only -- it's the only thing -
18 - it's the interplay between the examiner and the patent
19 applicant. If the patent applicant gets a -- a certification
20 of invalidity, then certainly that could be appealed.

21 If there's a certification of validity, that
22 decision cannot be appealed.

23 THE COURT: We've seen a lot of appeals in this
24 courthouse. It doesn't happen in two weeks, or two months, it
25 takes a while.

1 MR. ZACCARIA: Now those are all my points, unless
2 Your Honor has any additional questions.

3 MR. ZACCARIA: Thank you, Judge.

4 THE COURT: Thank you. Novel Brands, do you have
5 anything to add?

6 MR. O'REILLY: I do have something that I want to
7 address, the question that you raised, because I believe we
8 have the perspective on the -- but I'll wait until the --

9 THE COURT: Are you going to -- you're going to tell
10 us why a square pan is more advantageous over a round pan?

11 MR. O'REILLY: I can give you that a whirl, Your
12 Honor. I can assure you I'll be wrong, but I would say
13 addressing that, that no matter the issue of the popularity of
14 the pan, the question here is the validity of the patent.

15 And even if the appeal has some first move or
16 advantage to the plaintiff, the question becomes, is the
17 patent valid? And that's the base of the complaint -- of the
18 dispute, and should be the focus of the motion to stay. But
19 that's not what I wanted to say.

20 What I wanted to say is, Your Honor asked
21 repeatedly, why or how should the other cases that were filed
22 play into this motion to stay? And I think that, in my kind
23 of lowbrow view of how you look at a motion to stay, you say,
24 what do we conserve for resources, versus fairness to the
25 plaintiff.

1 You know, they get their day in Court. Here, the
2 plaintiff chose to file these cases in different ways, in
3 different places, not as related cases. So they can't claim
4 it's unfair to them to have another case going on in Newark,
5 and have it stayed here, when they're the ones that chose to
6 file in that manner. And I think our case exemplifies that.

7 Because our case was filed in Rhode Island. Neither
8 the plaintiff nor Novel have any connection to Rhode Island.
9 Hence, why it was transferred here. Now I cannot come up with
10 a reason why it was filed there, other than they had some
11 attorneys that work there. That was the reason they gave.
12 Obviously there are attorneys here as well.

13 But I think it shows a propensity to try to increase
14 the cost on the defendants. We're a small company. We --
15 litigating this case throughout would be very costly for us,
16 more so than any damages would be.

17 So filing in Rhode Island, and not allowing us to
18 join other people practical -- it in all practical terms takes
19 us out of the game. But we're here now, and we're joined in
20 this motion to stay. And, hopefully, if it's not stayed,
21 we'll join the discovery, hopefully within our cost.

22 But I think the point is, is that the plaintiff
23 should not be rewarded for filing cases in multiple
24 jurisdictions, or in the same jurisdictions not filing them as
25 related cases, which I still don't understand how it was done,

1 that shouldn't be rewarded by denying the motion to stay here.

2 Because the motion to stay here will most certainly
3 conserve resources. And the fairness element is taken off the
4 table by their own actions. And that would be my answer to
5 your question, Your Honor.

6 MS. SAYOUR: Your Honor, may I address your question
7 about the square pan? Just because I am a baker. And
8 everybody looked at me when it happened. But I did remember
9 that when we were -- when we were opposing the motion for
10 preliminary injunction, I watched a few infomercial's, and it
11 was about plaintiff's square pan.

12 And in the words of their own advertising:

13 "With the square pan, you have more surface, you
14 can fit more product into the pan."

15 And:

16 "In a square pan you get a little pour spout built
17 right in."

18 And that was when they were talking about the
19 rounded edges. And then they talked about, there's more:

20 "And remember my square shape is working for me
21 here, Denise."

22 Denise says:

23 "Yes, it is.

24 "Because, look, I can get all these pork chops in,
25 because I have four corners. Right?"

1 "Right."

2 "When you have a round pan you can't do that."

3 Denise:

4 "That's right. It's not that big, I get it. So
5 Copper Chef's unique square shape means it can cook more food,
6 you can't get this -- you can't make this in a round pan."

7 So that's -- thank you, Your Honor.

8 THE COURT: Thank you.

9 MS. O'REILLY: Thank you.

10 THE COURT: Plaintiff, I'm sure you are anxious to
11 argue.

12 MR. KRITZER: Good afternoon, Your Honor. Noam
13 Kritzer on behalf of Tristar Products.

14 THE COURT: Just indulge me with a question or two,
15 counsel.

16 MR. KRITZER: Certainly.

17 THE COURT: Do these motions rise or fall together,
18 in your view?

19 MR. KRITZER: No, Your Honor.

20 THE COURT: So in your view, theoretically,
21 hypothetically it could be possible, we stay one case, and two
22 cases proceed, vice versa, you know, you could have any
23 combination of the three cases, that's your view?

24 MR. KRITZER: I don't think it's any combination, I
25 think that the 1204 case, Your Honor, involves a different set

1 of patents, that even if the reexam's are wholly successful,
2 will still need to be tried. And since Rule -- the breadth of
3 Rule 26 would cover the discovery over all the copper pan, it
4 makes less sense to stay the 1204 case, then, say, the 1206
5 case, which all of the patents that are in that case are being
6 reexamined.

7 THE COURT: Is that because the 009, 908 and 909
8 patents are not subject to reexamination? Is that why you're
9 saying that?

10 MR. KRITZER: Correct, Your Honor. In addition, the
11 908 and 909 patents, prior to issuance the patent examiner
12 considered all of the references submitted by Telebrands, as
13 well as all of the papers in all of the cases, we submitted
14 the complaints, we submitted the preliminary injunction
15 motions, we submitted everything for our consideration. And
16 on the front of the 908 and 909 patents, you can see that the
17 examiner considered them prior to issuing the 908 and 909
18 patents.

19 So I think that it's -- it's less -- less efficient,
20 because even if the examiner finds that the other four
21 patents, the 664, 103, 641 and 352 patents are valid, we still
22 have the validity of these patents that will have to be tried.

23 THE COURT: But that happens all the time, doesn't
24 it? You can have a -- aren't there legions of cases where a
25 stay is granted with the Court knowing that some portion of

1 the case is going to come back to it in the future.

2 MR. KRITZER: Of course.

3 THE COURT: So in and of itself that's not enough to
4 deny a stay.

5 MR. KRITZER: No, Your Honor. But I believe the
6 question was whether or not they all had to be stayed
7 together, and that would be one reason, in the Court's
8 discretion to find that -- that the 1204 case should not be
9 stayed.

10 THE COURT: You heard their argument about -- the
11 direct competitor argument, that was a big part of your
12 response and brief. What say you?

13 MR. KRITZER: Well I don't understand the argument
14 so much. They rely on the two-party competitor system. Which
15 I understand if it's two-party competitor and you have one
16 competitor in Court, you have basically the rest of the market
17 in the courtroom, and that factor, simply having multiple
18 competitors in the marketplace doesn't change the analysis if
19 you have all the other competitors in the courtroom as well.

20 It might as well be a two -- a two-party marketplace
21 with the plaintiff and all the defendants at being two-party.
22 So the analysis I guess probably went over my head.

23 THE COURT: Well I thought part of your argument was
24 that, take Telebrands for example, that because their product
25 is on the market your client has suffered a substan -- a loss.

1 And their position is, if they're not buying Telebrands,
2 they're buying something else, not necessarily your product.

3 MR. KRITZER: Right. And our response to that would
4 be, they're buying one of the other infringing products that
5 we have the defendant in Court either here, or in Newark, or
6 there's a case or two in Rhode Island as well. So the
7 argument fails when you consider all the defendants as a
8 whole.

9 And I think that, you know, Your Honor said it
10 pretty plainly before, if all of these square pans have been
11 ubiquitous as all defendants are now claiming, why is it that
12 all of a sudden, after Tristar patents and introduces the
13 square pan, you go to Walgreens, you go to Bed Bath and
14 Beyond, you go to, you know, some of the other -- Walmart, and
15 you see shelves of these, and they're identical to one
16 another.

17 So I think that whichever one they buy, they would
18 have bought only the Tristar product, because that's, you
19 know, patents convey the limited monopoly. But just because
20 they're not buying the Telebrands one and they're buying the
21 E. Mishan one, doesn't mean that Tristar's not being harmed.
22 Tristar's still being harmed, it's being harmed by one of the
23 defendants in the courtroom. Either this courtroom or another
24 courtroom.

25 THE COURT: That's one part of their argument. But

1 another part of their argument is that, you know, your brief
2 can argue and state in general conclusory terms that we're
3 losing business because of their products, and, yada, yada,
4 yada, yada, but where's the proof?

5 You know, that's another part of their argument.
6 And they rely on the statements that Judge Bumb made at the
7 preliminary injunction. And as I understand it, please
8 correct me if I'm wrong, you haven't submitted any new
9 evidence to prove that these defendants are -- are resulting
10 in a loss of business to you, other than what you submitted at
11 the preliminary injunction hearing.

12 MR. KRITZER: That's correct, Your Honor. I would
13 submit --

14 THE COURT: So why -- why are you -- same evidence
15 that Judge Bumb found not convincing, now convincing before
16 this Court?

17 MR. KRITZER: Well there's two parts, Your Honor.
18 First -- the first part is that the standards are different
19 upon review of a motion for summary -- for a preliminary
20 injunction, and the standard on whether or not to grant the
21 stay. And I think that that's important, because the grant of
22 preliminary injunction is an extraordinary remedy.

23 THE COURT: Well tell me what evidence you have
24 submitted to support the contention that you're losing
25 business because of these competitors' products?

1 MR. KRITZER: We only have declarations and
2 commonsense, Your Honor. That's all. And that was submitted
3 earlier. And, again, Tristar has, you know, over a half a
4 dozen patents covering this product. It didn't exist before
5 Tristar put it on the shelves, and now there are shelves full
6 of competing products.

7 It's not unreasonable to -- to suggest that for
8 every product purchased that is not a Tristar product, that
9 Tristar's losing market share. The issue you have with
10 proving that at this stage, is that it's a complex analysis,
11 and we would have to undertake the discovery.

12 We don't know how many products are sold to E.
13 Mishan. We don't know how many products are being sold by
14 Telebrands. It's a complex analysis. I believe the
15 declaration of Eddie Mishan himself indicated that it's -- you
16 know, this kind of analysis is very complex and very difficult
17 to undertake.

18 Once we have the discovery, we'll be happy to engage
19 an expert to submit a declaration at the appropriate time.
20 But at this point, it's -- it's a very difficult and very
21 complex analysis. So --

22 THE COURT: So am I hearing then that a tacit
23 acknowledgment that no substantial proof has been submitted
24 that your client is suffering a monetary loss, loss in sales
25 because of the defendants' product?

1 MR. KRITZER: Nothing more than was submitted to --
2 in connection with the complaint and the motion for
3 preliminary injunction. But I don't think the inquiry ends
4 there. Really, the inquiry comes down to, and I apologize I
5 don't have fancy slides, but slide 16 of Telebrands's
6 presentation, Your Honor, this is the crux, and the attorneys
7 for E. Mishan said the same thing, the crux of this is --
8 actually, Novel Brands said it as well, so all three, the crux
9 is the balancing, and the Court's discretion on the balancing
10 of -- of whether or not it -- what resources would be
11 conserved, and the inconvenience of plaintiff.

12 The inconvenience to the plaintiff everybody agrees
13 on, is not overwhelming to the point where it decides the --
14 the outcome. And we are forced to concede that as well, Your
15 Honor, as you just pointed out.

16 However, we have to look at what resources would be
17 conserved if there is a stay. And everybody seems to -- on
18 defendants' side seems to assume the conclusion that these
19 patents will be invalidated. And that's the only -- if you
20 look at the header on pages 16 and 17, "if the patents in suit
21 are invalidated, the case will be simplified."

22 Of course that's a very reasonable position and it's
23 tough to argue against, Your Honor. The -- the problem is, is
24 if they're not invalidated, the case isn't simplified at all,
25 it's just delayed, and unnecessarily so. Because, again, the

1 breadth of Rule 26 discovery on the trade dress claims, and I
2 think you heard it straight from defendants' mouths, overlaps
3 significantly with the discovery that would be required for
4 the patent infringement causes of action as well.

5 THE COURT: You're not suggesting the Court doesn't
6 have the authority to also stay the trade dress claim, are
7 you?

8 MR. KRITZER: Not at all, Your Honor. All I'm
9 saying is, if the trade dress claims are stayed, and the
10 patents in suit are invalidated, then we would have to resume
11 with the trade dress claims at the conclusion of the
12 reexamination.

13 So all you're doing with the trade dress claims is
14 delaying them, which is well within the Court's discretion.
15 But if the discovery on the patent claims will overlap with
16 the discovery from the trade dress claims -- and the trade
17 dress discovery will have to happen anyway, there's no
18 conservation of resources by staying the case, there's just
19 delay.

20 In addition, as Your Honor pointed out, there's two
21 other cases in Newark that are pending. And as the attorney
22 for Novel Brands pointed out, there's other cases in Rhode
23 Island that are pending. The attorney for Novel Brands is
24 very passionate about not understanding why they're not
25 related cases. I can tell you that, from my perspective, the

1 cases were filed as related cases, the District Court of New
2 Jersey splits them up, I guess, however they see fit.

3 But if --I don't believe that any of the defendants
4 in either of those four other cases have requested a stay.
5 They've -- their answers have been filed in the Newark cases.

6 THE COURT: Is it the same patents at issue?

7 MR. KRITZER: Over -- yes. In -- I don't believe
8 any of them overlap entirely. They're, you know, a subset of
9 the overall patents here. It is present in each of those
10 cases.

11 THE COURT: Do we know if they know about the
12 ongoing reexamination?

13 MR. KRITZER: I believe at least one of the
14 defendants is aware of it. I don't know about the remaining.

15 THE COURT: Is that something you have -- not you,
16 your client has a duty to disclose?

17 MR. KRITZER: If it does have a duty to disclose,
18 then it will disclose them either as part of the initial
19 discovery, or the discovery requests, whenever --

20 THE COURT: Do you have a duty to disclose?

21 MR. KRITZER: I don't know -- I honestly don't know
22 the answer to that, Your Honor. But we would disclose it, we
23 have nothing to hide. So we would disclose it upon first
24 opportunity. There's no reason not to. And like I said, we
25 -- we know for sure --

1 THE COURT: Did you have your Rule 16's in those two
2 New Jersey cases?

3 MR. KRITZER: Yes, Your Honor.

4 THE COURT: Was it disclosed at the Rule 16
5 conference?

6 MR. KRITZER: At one of them it was discussed at the
7 Rule 16. At the other, I don't believe it came up, and I
8 don't know if it -- at this point I don't know whether the
9 Rule 16 happened prior to the date of the motion.

10 So the analysis that we need to be considering here
11 is whether or not the -- there's efficiency in staying the
12 case, because if there is judicial efficiency, if there is
13 significant conservation of resources, then it makes sense to
14 stay the case.

15 And if it -- if there isn't, then it doesn't make
16 sense to stay the case. I think that's the -- the task that
17 is upon the District Court in determining whether or not to
18 exercise its discretion in executing a stay.

19 Again, with respect to the 1204 case, the -- there
20 is not a full overlap of the patents that are in
21 reexamination. And I don't believe that there's any
22 inefficiency in taking the discovery with respect to all of
23 the patents in suit.

24 Because the two patents that will be remaining, even
25 if all four reexaminations are successful, the discovery's

1 nearly, if not fully identical. The product in question will
2 be identical, the deponents will be identical, the testimony
3 will be nearly identical, if not identical.

4 So from a conservation of defendants' resources, I
5 don't see any benefit to -- to a stay. With respect to the --
6 all of the patents in suit, all the cases before the Court,
7 you have the trade dress issues, which, again, will have to be
8 adjudicated following the reexamination.

9 And there's a different standard in determining
10 whether or not there's trade dress infringement. And they
11 mentioned there -- one of the attorneys mentioned that they
12 didn't see any confusion. We actually have instances of
13 actual confusion, at least one I'm aware of, Your Honor.

14 I don't know why that needs to be tried today, or
15 discussed today. But I felt the need to say it, because they
16 did. But there's a different standard for trade dress
17 infringement then there is for patent infringement, and the
18 standard for a trade dress infringement I think is a little
19 broader, because you're not narrowed to the specific design of
20 a design patent. Coupled with the breadth of Rule 26, again,
21 discovery on the trade dress claims would fully encompass the
22 discovery required for the patent claims, with one exception.

23 And that is, if the patent claims fail, if the
24 patent claims end up out of the case, then no discovery would
25 be needed from the Chinese defendant, the co-inventor of the

1 patent, Ke M.o.

2 We also think it's important and I -- I briefly
3 glossed over it earlier in response to one of your questions,
4 but we think it's very important to note that the patent -- a
5 patent examiner at the Patent and Trademark Office has already
6 considered all the arguments made in the preliminary
7 injunction, and all of the arguments made as part of the --
8 the reexaminations, and has issued the last -- the most recent
9 two patents.

10 One thing that occurs to us, Your Honor, is that --
11 and Mr. Zaccaria mentioned this as well, there's a preclusive
12 binding effect on Tristar in the reexamination, there's no
13 conclusive or binding effect on any of the defendants here. I
14 think that weighs slightly against granting a stay as well.
15 Because if the patents are successful, and upheld on
16 reexamination, we're going to be back in front of this Court
17 trying invalidity a second time.

18 So they'll get a second bite at the apple. I think
19 that our case for a stay would be weaker, if the defendants
20 agreed to be bound by the result of the reexamination. If
21 defendants agreed that they wouldn't challenge validity if the
22 Patent Office found the reexamination. Obviously, it's a
23 tougher ask from the defendant that did submit the
24 reexamination. However, as per Telebrands in the 1206 case,
25 they compiled all the prior art they knew of.

1 They submitted it to the Patent Office. If the
2 Patent Office decides that it's upheld, we don't want to be
3 back here fighting, you know, invalidity from them again,
4 they've already had their bite.

5 THE COURT: Do you think there's any chance they'll
6 agree to that binding effect?

7 MR. KRITZER: I think if Your Honor said that Mr.
8 Kritzer made sense, and that if I -- if you are not going to
9 bind yourself, then I will not grant the stay, there's a
10 chance, Your Honor.

11 THE COURT: Has that ever happened in any of your
12 cases?

13 MR. KRITZER: Yes, Your Honor. And it's actually
14 happened in a Telebrands case. A case between Tristar and
15 Telebrands where Judge Donio lifted a stay, because the
16 defendant would not agree to be bound by an administrative
17 procedure.

18 THE COURT: Another patent case?

19 MR. KRITZER: Correct.

20 THE COURT: That --

21 MR. KRITZER: Yes. You know those expandable and
22 contractible hoses? You can talk to Judge Donio about it.

23 THE COURT: That's yours? That's yours, too?

24 MR. KRITZER: That's Telebrands and Tristar. Well
25 you saw from the PowerPoint --

1 THE COURT: Is that the one they tell you never
2 breaks, but I need to -- is that your client's?

3 MR. KRITZER: That's not the Tristar hose, Your
4 Honor. I won't -- I won't tell you whose hose it is.

5 THE COURT: Do you know how many of those hoses I've
6 bought?

7 MR. KRITZER: Well depending on which color it is, I
8 can tell you which -- if it's the light green one, it's
9 Telebrands, if it's the blue one, it's Mr. Mishan's, if
10 it's --

11 THE COURT: The one that sells at Bed Bath and
12 Beyond, is that the green one?

13 MR. KRITZER: The light green one would be
14 Telebrands, I believe.

15 THE COURT: Well, never mind, let's not go there.
16 But --

17 MR. KRITZER: I'm not saying anything about their
18 product, I'm just answering your question, Your Honor.

19 THE COURT: But, boy, that -- they broke every
20 single time I used them.

21 Anyway, let's talk about pans.

22 MR. KRITZER: And now that we have a little break,
23 I'll also add my two cents on the pan. My chili's never
24 tasted better, Your Honor.

25 THE COURT: And I don't eat pork chops, so I'm not

1 worried.

2 MR. KRITZER: You know, and another reason the cases
3 don't rise and fall together, Mr. Zaccaria was clear that, you
4 know, each of the cases is different products, and different
5 defendants, and different -- so there's no reason to hold one
6 to the same standard as the other when considering a motion to
7 stay, particularly because of the difference in the overlap in
8 the patents.

9 If he wants to bring up the -- the difference in the
10 products as well, you know, we'll take it. And my numbers
11 were a little different than Mr. Zaccaria's numbers. Our
12 average time to end of reexamination, not including appeal,
13 was 39 months.

14 And we think that that's a little too long. And
15 we're not going to quibble about it, 24 months is too long
16 too. Particular --

17 THE COURT: It takes a long time.

18 MR. KRITZER: -- it takes a long time. And the --
19 the balancing is, is whether or not in each of the particular
20 cases with the different factors, that I'm not going to repeat
21 again, discovery, et cetera, that 24 months is too much in
22 this case, because at the end of that 24 months, even if the
23 reexaminations are successful, there's going to be a ton of
24 work to do on the remaining patents and claims, and those
25 overlap.

1 I can't think, other than, again, other than
2 plaintiff Ke M.o., I can't think of any resources, Court's or
3 otherwise, that would be wasted by allowing these cases to go
4 forward. With the caveat that we're -- we're now talking
5 about the non-Telebrands cases, right? Oh, no, we're talking
6 about them all. Sorry.

7 THE COURT: I'm sorry?

8 MR. KRITZER: No, I'll -- let me repeat. I can't
9 think, other than the involvement and deposition of the
10 Chinese entity, Ke M.o. who is the co-inventor on the patents,
11 I can't think of any discovery that will not be necessary,
12 even if all four reexaminations are successful.

13 THE COURT: Because of the trade dress claim.

14 MR. KRITZER: Correct. And the fact that Rule --
15 the Rule 26, the discovery requests will cover the same
16 documents, people, information, in both. So if we're taking
17 the balancing test over the 24 or 39 months, depending on who
18 you want to believe, versus that one Chinese entity's
19 testimony, documents, subscription, then I think that that
20 weighs against the stay.

21 And in the event that we want to deal with that, I
22 think we can come up with a clever way of dealing with that,
23 postponing their testimony until 24 months. I know there was
24 complaint about, well, the expert reports, et cetera. You
25 know, we'll get there. If we need to postpone later, we can

1 do that. But at this point, you know, discovery is going to
2 have to be conducted that way. Thank you, Your Honor.

3 THE COURT: Thank you, counsel.

4 MR. KRITZER: Unless you have any questions.

5 THE COURT: Counsel, you have the last word, and
6 this is where you stand up and say, I'll be brief.

7 MS. SAYOUR: I will be very brief, Your Honor.

8 First thing, I know my partner reminded me that I should have
9 told you the docket number from the script that I read into
10 the record. It was Docket Number 17 in our case, on page 17.
11 So if you need that, it's there.

12 Your Honor, Tristar is -- is trying to claim
13 exclusive rights to a square pan. They cannot. It's nothing
14 new.

15 THE COURT: But I'm not here to -- we're not here to
16 judge the merits of the case.

17 MS. SAYOUR: No, no, I understand that. And I guess
18 where I'm going is, they argue that we're going to get two
19 bites at the apple. But that assumes that there's going to be
20 an apple left at the end of the reexamination.

21 This Court has already determined in connection with
22 the denial of the preliminary injunction in the Emson
23 litigation, that two of these patents are likely to be
24 invalid. And when we look --

25 THE COURT: You know what, counsel, I think I can

1 sometimes read your mind, but I can't read the Patent and
2 Trademark Office's mind. I don't know how they're going to
3 rule. And I don't really think I can base my decision on
4 whether I think they're going to rule one way or the other.

5 You think you're going to win, plaintiff thinks
6 they're going to win, and I don't think that's a relevant
7 consideration to the motion to stay.

8 MS. SAYOUR: No, that's fair, Your Honor. I guess
9 that's why we're all -- we're all here. I guess what I do
10 want to address is their argument on the simplification of the
11 issues. I just -- your decision in the Brass case made note
12 of whether or not reexamination has the potential to eliminate
13 an issue altogether and reduce the costs associated with
14 litigating it.

15 And you also noted that if the PTO opposed the
16 validity of plaintiff's patents, the plaintiff's rights will
17 only be strengthened, as the challenger's burden of proof
18 becomes more difficult to sustain.

19 And I think that's the issue here. I mean, if the
20 patents go away, then the issues will be simplified. And if
21 they don't, then we have a -- they have a stronger patent.
22 You know, disappointing to us, but that would be it. There
23 was some argument about all the competitors that are here --
24 or all the -- I don't know that I followed it 100 percent, but
25 that are here, or what's in the market.

1 And that's just not true. I think in Zaccaria's
2 declaration Exhibit C there are a whole bunch of other people
3 selling square pans that I don't believe are here. And
4 certainly people may buy a pan from Telebrands -- people may
5 not buy a pan from Telebrands, may not buy a pan from Emson,
6 may not buy a pan from Tristar, any of the others, but there
7 are other pans out there.

8 That's all I have.

9 THE COURT: Thank you.

10 MS. SAYOUR: Thank you, Your Honor.

11 MR. ZACCARIA: I'll be brief Your Honor.

12 THE COURT: You can stay there, counsel.

13 MR. ZACCARIA: Okay. Great. Just two points -- I
14 think three points. First point, Mr. Kritzer refers to the
15 submission of prior art in connection with the 908 and 909
16 patent, and that the examiner considered the prior art.

17 That's not true, Your Honor. The fact that you
18 submit prior art doesn't necessarily mean that the examiner's
19 looking at every single page, hundreds of pages of prior art
20 that was submitted.

21 That prior art was not considered, they simply
22 provided it to the Patent Office, which it got rubber stamped,
23 and now it's on the front page of the patent. But it wasn't
24 considered. That's number one, Your Honor.

25 Number two, in terms of reserving resources, expert

1 discovery is a big resource that would be conserved by staying
2 the case. We're going to have expert discovery on four -- on
3 at least three patents, the 103 patent, the 664 patent, and
4 the 352 patent.

5 That is -- the last I checked, expert discovery
6 would be quite costly, and that's certainly something that
7 would be -- would be beneficial to -- to postpone. Also claim
8 construction. What happens if the Emson case is not stayed,
9 but the Telebrands case is stayed?

10 The Patent Office determines that the claims, the
11 patents are invalid, but this Judge, this Court determines
12 that the claims are not -- patents are not invalid and they're
13 infringed. Who's prejudiced there, Your Honor? Emson is. So
14 it doesn't make sense to stay one case and not to stay the --
15 they all have to be stayed.

16 That's it, Your Honor. Thank you.

17 THE COURT: Thank you. Okay, counsel, the record is
18 closed. And as I've told you, the Court reserve decision. I
19 wanted to check on a couple of things, hear the argument
20 today. But you will get the Court's decision promptly. I
21 just want to add one more thing for the benefit of the
22 lawyers.

23 The Court appreciates the excellent briefs and oral
24 argument this afternoon. Here we have my old law clerk, who's
25 leaving in a few days to get a real job as a lawyer instead of

1 a law clerk, and a new law clerk who's just starting. And
2 there sure are some excellent lawyers arguing some very
3 difficult issues, and I'm glad they were here to see the
4 caliber of lawyer in this courtroom.

5 So, thank you all, we're adjourned. And you'll get
6 the Court's decision promptly.

7 ALL COUNSEL: Thank you, Your Honor.

8 THE CLERK: All rise.

9 (Proceedings concluded at 4:14 p.m.)

10 * * * * *

11 C E R T I F I C A T I O N

12 I, Josette Jones, court approved transcriber, certify that the
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